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Via www.regulations.gov

Mr. Thomas Feddo
Assistant Secretary for Investment Security
U.S. Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Re: Comments on the Proposed Provisions Pertaining to Certain Investments in the United States by Foreign Persons (31 CFR Part 800) and the Provisions Pertaining to Certain Transactions by Foreign Persons Involving Real Estate in the United States (31 CFR Part 802)

Dear Mr. Feddo:

Sidley Austin LLP is an international law firm that has represented numerous foreign investors and U.S. businesses before the Committee on Foreign Investment in the United States ("CFIUS"). We appreciate the opportunity to provide comments on the proposed Provisions Pertaining to Certain Investments in the United States by Foreign Persons at 31 CFR Part 800 and the proposed Provisions Pertaining to Certain Transactions by Foreign Persons Involving Real Estate in the United States at 31 CFR Part 802 (the "proposed rules"), which implement section 721 of the Defense Production Act of 1950, as amended by the Foreign Investment Risk Review Modernization Act of 2018 ("FIRRMA").

In particular, the following comments identify eight aspects of the proposed rules where additional clarity on the scope and application of key provisions would be helpful.

1. Definition of "Voting Interest" in Section 800.254

Section 800.254 of the proposed rule defines "voting interest" as "any interest in an entity that entitles the owner or holder of that interest to vote for the election of directors of the entity… or to vote on other matters affecting the entity." Although the definition of voting interest is the same as in the current regulations, the term has added significance in that it is used to determine whether the "substantial interest" test is met under Section 800.244,[1] which, in turn, relates to

[1] Section 800.244 defines "substantial interest" as "a *voting interest*, direct or indirect, of 25 percent or more by a foreign person in a U.S. business and a voting interest, direct or indirect, of 49 percent or more by a foreign government in a foreign person." Emphasis added. Section 800.244 further states that in the case of limited partnerships, a foreign

whether an investment is subject to a mandatory filing requirement under Section 800.401, and it is used in the definition of "minimum excepted ownership" under Section 800.234,[2] which, in turn, relates to whether an investor qualifies as an excepted investor under Section 800.220(a)(3)(v).

Based on Assistant Secretary Feddo's statements during the 27 September 2019 Stakeholder Briefing on the Proposed FIRRMA Regulations, we understand that "voting interest" does not include economic rights or special rights, such as consent or veto rights. In light of the above considerations, we suggest the following clarifications:

a) The final rule should explicitly state that consent and veto rights are not "voting interests."

b) The final regulations should clarify that a contractual right of an investor to appoint or designate one or more board members, as opposed to an actual right to vote on a slate of directors, is not a voting interest, even if such right is granted by the holders of voting interests. If the right to appoint a director is a voting interest, CFIUS should clarify how the size of such voting interest should be calculated.

1. For example, assume an investor holds a 15% voting equity share but has the right to appoint one of five directors to the board. For purposes of determining whether the "substantial interest" criteria have been met, what percentage of the total voting interest would that investor hold, assuming no other relevant facts?

2. Assume the same facts as the preceding example, except assume that the investor has the right to appoint one of four directors to the board. For purposes of determining whether the "substantial interest" criteria have been met, what percentage of the total voting interest would that investor hold, assuming no other relevant facts?

3. Assume an investor holds a 15% voting equity share, and has the right to cause all other shareholders to vote in favor of that investor's nominee to the board. Assume also that there are a total five directors, and the

government will be deemed to have a substantial interest in certain cases, including if "[i]t is a limited partner and holds 49 percent or more of the *voting interest* of the limited partners." Emphasis added.

[2] In relevant part, Section 800.234 defines "minimum excepted interest" as "(a) With respect to an entity whose equity securities are primarily traded on an exchange in an excepted foreign state or the United States, a majority of its voting interest…[among other interests]; and (b) With respect to an entity whose equity securities are not primarily traded on an exchange in an excepted foreign state or the United States, 90 percent or more of its voting interest…[among other interests]."

investor only has the right to nominate one director. How should the investor's voting interest be calculated?

c) The final rule should provide that "voting interest" does not cover voting on any "matters affecting the entity" but only specific categories of matters. For example, "voting interest" could be limited to voting for directors, and not include other matters. If CFIUS decided that other matters should be included, then it should specify which matters are relevant:

1. Voting interest could include only voting interests in connection with the matters specified in Section 800.208(a).

2. Voting interest could exclude voting interests on matters specified in Section 800.208(c).

3. Voting interest could exclude a contractual right to require other holders of voting interests to vote their shares in a particular way such as the contractual right to require other shareholders, in connection with the exercise of drag along or tag along rights, to vote their shares in favor of the transaction.

4. Voting interest could exclude the right to remove a general partner in the event the general partner engages in wrongdoing or malfeasance.

d) The final rule should clarify how the various voting thresholds for substantial interest, minimum excepted ownership etc., should be calculated when an investor has different levels of voting interest with respect to different decisions. For example,

1. For example, assume an investor owns 70% of a class of preferred stock. Suppose that the class of preferred stock is entitled to vote, on an as-converted basis with the common stock on the election of directors and that, upon conversion, the preferred stock represents only 1% of the common stock of the company. Assume further that a vote of a majority of the outstanding preferred stock is required to approve any merger consolidation or other business combination of the entity. Should the investor be considered the holder of a 0.7% voting interest (because that is such investor's interest with respect to the election of directors) or a 70% voting interest (because it is entitled to vote with respect to mergers, consolidations or other business combinations).

e) As noted above, we understand that "voting interest" does not include consent or veto rights. In light of that understanding, the final regulations should provide

guidance, with examples, explaining the kinds of limited partner voting rights CFIUS is contemplating in Section 800.244(b)(2). The guidance and examples should include (but should not be limited to) the types of matters for which a limited partner vote would be excluded from the definition of "voting interest."

2. Covered Investment Rights in Section 800.211

It would be helpful if the final rule clarifies when an ownership interest in a U.S. business that in turn invests in another U.S. business results in a "covered investment" pursuant to Section 800.211. Clarification would be helpful with respect to the examples provided below:

a. Foreign Person A holds a non-controlling interest and a board seat in Company B, a U.S. business that is not a foreign person as defined in Section 800.225. Company B makes an investment in Company C, a TID U.S. business. Assuming Foreign Person A is not an "excepted foreign investor," would Foreign Person A's membership on the board of Company B be considered a "membership or observer right on the…equivalent governing body of the TID business" under Section 800.211(b)(2), such that Company B's investment in Company C is a "covered investment" as defined in Section 800.211? Assume no other relevant facts. It would be helpful if CFIUS could clarify that, where Company C has a separate board or governing body, a membership or observer right at Company B would not alone be sufficient to make Company B's transaction with Company C a covered investment.

b. Same facts as (a), above. In addition, as a result of its board seat at Company B, Foreign Person A receives material nonpublic technical information in the possession of Company C, a TID U.S. business. Assuming the transaction is subject to a mandatory filing (*e.g.*, as a result of the pilot program), would the filing obligation rest with Company B or Foreign Person A? It would be helpful if CFIUS could amend Section 800.237 to clarify that, for purposes of a mandatory declaration, the relevant "party to a transaction" is the party *directly* acquiring the ownership interest.

3. Access to Material Nonpublic Technical Information in Section 800.211

Under Section 800.211 of the proposed rule, a "covered investment" includes an investment by a foreign person in a TID U.S. business that affords the foreign person, *inter alia*, "access to any material nonpublic technical information in the possession of the TID U.S. business." Section 800.233 defines "material nonpublic technical information" to include information that "provides knowledge, know-how, or understanding not available in the public domain, of the design, location, or operation of critical infrastructure" and information "not available in the public domain that is necessary to design, fabricate, develop, test, produce, or manufacture a critical technology."

In the ordinary course of an investment, prospective investors engage in due diligence that could include information described in Section 800.233. For example, in assessing the soundness of an investment, an investor may review documents that include the location of critical infrastructure or technical information regarding a new critical technology in development. It would be helpful for CFIUS to clarify whether such access to material nonpublic technical information in the course of due diligence—prior to any investment—would be sufficient to make an investment a "covered investment," even where the investor will not be afforded any access to such information post-closing.

4. Definition of Minimum Excepted Ownership in Section 800.234

Under Section 800.220 of the proposed rule, a foreign entity can qualify as an "excepted investor" only where, *inter alia*, "[t]he minimum excepted ownership of such entity is held, individually or in the aggregate, by one or more persons who meet specified criteria. Section 800.234 defines "minimum excepted ownership" to mean, "[w]ith respect to an entity whose equity securities are not primarily traded on an exchange in an excepted foreign state or the United States, 90 percent or more of its voting interest, the right to 90 percent or more of its profits, and the right in the event of dissolution to 90 percent or more of its assets".

CFIUS should clarify, in the final rule, how to understand "minimum excepted ownership," in cases where an entity does not have share capital and, therefore, no "voting interests." Specifically, CFIUS should amend the definition of "minimum excepted ownership" in Section 800.234 in the following manner: "… 90 percent or more of its voting interest *(or, in the event the entity does not have share capital, the right to appoint 90 percent or more of its directors (or, with respect to unincorporated entities, individuals exercising similar functions)),*the right to 90 percent or more of its profits, and the right in the event of dissolution to 90 percent or more of its assets."

5. Calculation of Substantial Interest under Section 800.244(c) of the Proposed Rule

Section 800.244(c) of the proposed rule states that "[f]or purposes of determining the percentage of voting interest held indirectly by one entity in another entity [for purposes of determining whether a "substantial interest" exists], any voting interest of a parent will be deemed to be a 100 percent voting interest in any entity of which it is a parent." It would be helpful for CFIUS to provide examples clarifying the calculation of voting interest in accordance with this provision. For example:

a) Assume Company A holds a 25% voting interest in Company B, which in turn holds a 50% voting interest in Company C. Is it correct that, under Section 800.244(c), Company A will be deemed to hold a 25% indirect voting interest in Company C?

b) Assume Company A holds a 25% voting interest in Company B, which in turn holds a 49% voting interest in Company C. Is it correct that, under Section 800.244(c), Company A will be deemed to hold a 12.25% indirect voting interest in Company C?

It would be helpful if CFIUS could confirm the above examples, or if the examples are not correct, provide other examples illustrating the operation of Section 800.244(c).

6. Definition of Identifiable Data in Section 800.227

Section 800.227 of the proposed rule states that "aggregated data or anonymized data is identifiable data if *any party to the transaction* has, or as a result of the transaction will have, the ability to disaggregate or de- anonymize the data, *or if the data is otherwise capable of being used to distinguish or trace an individual's identity*." Emphasis added. With respect to the italicized clauses, CFIUS should consider the following alternative language: "aggregated data or anonymized data is identifiable data if *the foreign person or the U.S. business* has, or as a result of the transaction will have, the ability to disaggregate or de- anonymize the data, or if the data is otherwise capable of being used *by the foreign person or the U.S. business* to distinguish or trace an individual's identity." We respectfully submit that it should not be relevant if any third party can "disaggregate or de- anonymize the data" or use the data to "distinguish or trace an individual's identity."

7. Distinction Between a U.S. Business and Real Estate

Part 802 applies to investments in real estate, which Section 802.235 of the proposed rule defines as "any land, including subsurface and submerged, or structure attached to land, including any building or any part thereof, that is located in the United States." Part 802 does not apply to acquisitions of a U.S. business, which are instead covered by part 800.

CFIUS should provide further clarification on when the acquisition of commercial real estate constitutes the acquisition of a U.S. business. For example, assume that a foreign person acquires a newly constructed medical office building, but at the time of the acquisition, there are no tenants. Should that acquisition be treated as the acquisition of a U.S. business, and so covered by part 800, or of real estate, and so covered by part 802?

8. Changes to the Annexes and Other CFIUS Resources

The proposed rule for part 800 includes an annex listing the covered critical infrastructure referenced in Section 800.248, and the proposed rule for part 802 includes an annex listing the military installations referenced in Section 802.228. We ask that CFIUS provide further clarity regarding how changes to the annexes will be made, including whether such will changes be subject to a notice and comment period. If changes to the annexes are not subject to a notice and comment period, CFIUS should delay the effective date of any changes to ensure that parties are

given sufficient notice to properly reflect the changes in transaction documents. We respectfully submit that any transaction pending on the date of such change should be exempt from any new regulatory requirements. To the extent that CFIUS chooses to move to its website information contained in an annex or other information that would affect whether a transaction is subject to CFIUS jurisdiction, we respectfully request that CFIUS apply the same standard described herein.

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We appreciate your time and consideration of these comments.

Respectfully,

James Mendenhall

James E. Mendenhall